Supreme Court, U.S.

1168

10-243 AUG 17 2010

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SONNENSCHEIN NATH & ROSENTHAL LLP,

Petitioner,

v.

DOUGLAS E. ROSENTHAL,

Respondent.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

JAMES HAMILTON
Counsel of Record
DAVID B. SALMONS
DAVID I. ACKERMAN
RAECHEL K. ANGLIN
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6026
james.hamilton@bingham.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This Court has supervisory authority to review decisions of the District of Columbia Court of Appeals, even where that court decides questions of "local" law, and exercises that review "in exceptional situations where egregious error has been committed," or where important federal questions are presented. *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974). This Court also has authority to review federal-court misapplications of state law and "undoubtedly should do so" where there is "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). This case presents the following important questions:

1. Whether the Court of Appeals, in a matter of great importance to the nation's law firms, blatantly nullified Delaware law governing the covenant of good faith and fair dealing by awarding damages for a law firm's compensation decisions, where the Partnership Agreement expressly covers the conduct at issue, *as the Court of Appeals itself explicitly found.*

2. Whether the Court of Appeals egregiously misapplied District of Columbia law governing remedies by ruling that respondent was entitled to seek damages for periods for which the firm's Partnership Agreement allowed no compensation, including periods *after he voluntarily retired* from the law firm, in conflict with overwhelming precedent addressing damages following voluntary retirement.

3. Whether the Court of Appeals, in conflict with decisions of this Court, violated petitioner's due process rights by allowing damages for periods for which the Partnership Agreement precluded recovery, in-

cluding a period for which critical elements of liability were never considered by any trier of fact.

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PETITION FOR A WRIT OF CERTIORARI

Sonnenschein Nath & Rosenthal LLP respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The amended opinion of the District of Columbia Court of Appeals is reported at 985 A.2d 443. App., *infra*, 1a- 31a. The Court of Appeals' orders granting a petition for rehearing in part and denying a subsequent petition for rehearing of the amended opinion are unreported. *Id.* at 47a-51a. The initial opinion of the Court of Appeals is unreported. *Id.* at 52a-84a. The judgment of the trial court and orders of the trial court amending the judgment are unreported. *Id.* at 32a-46a.

JURISDICTION

The District of Columbia Court of Appeals entered judgment on December 24, 2009. *Id.* at 1a. A petition for rehearing was granted in part on March 18, 2010. *Id.* at 47a-49a. A petition for rehearing addressing the amended opinion was denied on May 20, 2010. App., *infra*, 50a-51a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause and portions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970), are reproduced in the appendix at App., *infra*, 85a-86a.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Sonnenschein Nath & Rosenthal LLP (SNR) is a large, international law firm. Douglas E. Rosenthal ("respondent") joined SNR as a partner on October 1, 1994.[1] The next year, respondent, like all other partners, executed a Partnership Agreement that provided that he would no longer be compensated as a partner if he retired. *See* App., *infra*, 88a-91a at ¶¶ 6.1, 7.1. Respondent remained a partner at SNR until he voluntarily retired on July 31, 2005. *Id.* at 92a.

For over a decade, SNR represented the families of victims of the 1988 terrorist bombing of Pan Am Flight 103 in their suit against Libya. When respondent joined SNR, he brought with him the representation of the family of one victim of that bombing, but SNR eventually represented members of twenty-three other families. Numerous SNR attorneys worked on the Libya case. Indeed, over the eleven years that SNR represented these families, some 129 SNR timekeepers (including numerous partners and associates) worked on the matter. Those timekeepers billed some 18,440 hours to the case. At times, both the firm and respondent considered the representation to be *pro bono*.

In October 2003, nine years after SNR began its representation, Libya settled the case with the Plaintiffs Committee, the entity coordinating the efforts of all the victims' families.[2] Payment under the Settlement Agreement was conditioned on the occurrence of certain political events. Two of these oc-

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[1] Mr. Rosenthal was not a named partner in SNR.

[2] Respondent served on the Plaintiffs Committee.

curred while respondent was a SNR partner, and payments were made to the families. These payments resulted in legal fees to SNR of approximately $18,000,000. App., *infra,* 4a.

When respondent worked with his colleagues on these representations, he was bound by SNR's Partnership Agreement, which he signed in 1995. That Partnership Agreement, with amendments, is the controlling document in this case. During respondent's tenure, SNR's Partnership Agreement:

> (1) expressly vested, *as the Court of Appeals found*, SNR's management committee — known as the Policy and Planning Committee — with the authority to set partner compensation every two years,
>
> (2) expressly provided, *as the Court of Appeals found*, a method for resolving outstanding compensation disputes in order to prevent later controversy,
>
> (3) expressly provided that a partner would be compensated only so long as he worked for the firm and did not take retirement status, which entitled him to certain other benefits but not compensation as a partner, and,
>
> (4) after a 1999 amendment approved by the partnership, expressly provided, *as the Court of Appeals initially found*, that the mandatory partner retirement age was 65, and not 70 as it previously had been.[3]

Id. at 3a, 7a, 74a-75a, 87a-92a.

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[3] SNR eliminated the mandatory retirement age provision in 2005 after respondent voluntarily retired.

II. THE PROCEEDINGS BELOW

A. Trial Court Proceedings

In September 2005, after he voluntarily left SNR and joined another firm, respondent sued SNR in the District of Columbia Superior Court, alleging, *inter alia*, that he had been forced to retire in violation of the Partnership Agreement and had been undercompensated for the periods 2003-2004 and 2005-2006. CA App. A-45-72. His principal claim as to 2005-2006 (the only period remaining at issue in this lawsuit) was that he had been inadequately paid after SNR received legal fees for its work for the families of the bombing victims. *Id.* at A-49-57, A-65-66. He made this claim even though his base compensation for 2005-2006 was revised upward to $800,000 from $325,000, which it had been for the previous two-year period. *Id.* at A-2507, A-2509. This was the highest percentage increase for any partner for the 2005-2006 period. *Id.* at A-2507. Had respondent remained at Sonnenschein throughout 2005, his compensation for that year would have been almost $1 million. *Id.* at A-1918.

In pursuit of his undercompensation claim, respondent alleged breach of contract, fiduciary duty, and the covenant of good faith and fair dealing. CA App. A-63-67. He also asserted claims based on quantum meruit and unjust enrichment for work on the Libya matter before he joined the firm. *Id.* at A-67-70.

SNR counterclaimed for tortious interference against respondent and Constantine Cannon, respondent's new law firm, based on their attempt to divert a $1.6 million fee owed SNR because of its representation of the family of two Lockerbie victims. *Id.* at A-286.

The trial judge granted summary judgment for SNR on respondent's forced retirement claim, finding that he voluntarily retired from SNR on July 31, 2005. *Id.* at A-356; App, *infra*, 92a. Because of that ruling, the trial judge found it unnecessary to rule on SNR's other defense that, under the Partnership Agreement in force when he left the firm, respondent would have been required to retire at the end of 2005, having by then reached the retirement age of 65. CA App. A-760. The trial court also granted summary judgment for SNR on respondent's quantum meruit and unjust enrichment claims because the Partnership Agreement covered his rights to compensation. *Id.* at A-356. Moreover, toward the end of trial, the trial court directed verdict for SNR on respondent's breach of contract claim for lack of evidence. *Id.* at A-3210-11.

The trial court left for the jury the issues of whether SNR had violated the implied covenant or breached any fiduciary obligations owed respondent. The jury charge on the implied covenant (which was agreed to by the parties and based on controlling Delaware law) instructed in part that "[e]xisting contract terms control" and that "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." App., *infra*, 93a. The charge (again relying on Delaware law) also instructed that the covenant could not apply unless it was "clear" from the controlling agreement that the parties to that agreement, had they thought to negotiate about it, would have "proscribed" the challenged conduct. *Id.*

The jury found that SNR had not violated any fiduciary obligations owed respondent, but found that SNR had breached the implied covenant of good faith and fair dealing and awarded him damages for the

contract periods 2003-2004 and 2005-2006. *Id.* at 32a-33a. The jury also found for SNR on its tortious interference claim and awarded it $300,000 in damages. *Id.* at 34a.

SNR filed a post-trial motion arguing that respondent was not entitled to compensation after he voluntarily retired on July 31, 2005 because (1) the "bargain" he struck in the Partnership Agreement only allowed him compensation while he worked at SNR and (2) partners were not entitled to damages after voluntary retirement. CA App. A4747-50. The trial court ruled that respondent was not entitled to damages after he voluntary retired on July 31, 2005 and accordingly reduced the jury's award. CA App., *infra*, 37a-40a, 92a. The trial court also denied SNR's motion for judgment as a matter of law on the implied covenant. *Id.* at 41a-42a.

B. Court of Appeals Proceedings

The Court of Appeals sustained the jury's finding that the covenant of good faith and fair dealing had been violated, but reversed the trial court's determination that respondent was not entitled to damages after he retired.[4] App., *infra*, 14a. The Court of Appeals gave respondent the option of reinstating the

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[4] The Court of Appeals also reversed the jury's award for 2003-2004 because respondent had signed a document (called Schedule A) agreeing to his compensation for those years. App., *infra*, 6a-8a. Additionally, it reversed the jury's award for SNR for tortious interference, concluding that SNR was not entitled to damages under the wrongful involvement in litigation doctrine solely because cross-defendant Constantine Cannon had been a party in the New York federal court proceeding. *Id.* at 3a, 24a-30a.

jury's damage award for 2005-2006 or retrial on the damage issue.[5] *Id.* at 32a.

SNR filed a petition for rehearing noting that the Court of Appeals had ignored crucial elements of controlling Delaware law relating to the covenant of good faith and fair dealing and that the court's *own factual findings* that the contract (Partnership Agreement) covered both compensation decisions and the resolution of disputes about compensation conclusively demonstrated that the covenant was inapposite. The petition also contended that the court's finding that the Partnership Agreement in effect when respondent voluntarily retired from the firm required him to retire at the end of 2005 was wholly inconsistent with its finding that he was entitled to seek compensation for 2006.

In response, the Division withdrew its finding that respondent was required by the Partnership Agreement to retire at the end of 2005, stating that the finding was unnecessary to affirm the trial court's summary judgment ruling on the forced retirement claim, which could be affirmed because damages after 2006 were too speculative. App., *infra* 48a-49a. The court did not address the other issues raised in the petition for rehearing. For example, it failed even to discuss SNR's argument that the court's own findings that the Partnership Agreement covered the compensation process "in its entirety" and covered the resolution of disputes about compensation mandated the conclusion under Delaware (and general) law that the implied covenant could not be applied. The court also did not address SNR's

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[5] Respondent subsequently opted for a retrial. Notice of Douglas E. Rosenthal's Election for a New Trial on Damages, CA. No. 2005 CA 007607 B (D.C. Sup. Ct. June 22, 2010).

argument that the express terms of the controlling Partnership Agreement did not allow respondent to be compensated after he voluntarily retired or after 2005, the year in which he reached the then mandatory retirement age.

SNR filed a second petition for rehearing, asserting that it was not only improper, but a violation of due process, for a jury to award damages for 2006, because, *inter alia*, no trier of fact had decided whether the Partnership Agreement required respondent to retire at the end of 2005 and therefore whether SNR was liable for 2006 damages. The court denied the second petition without discussion. App., *infra*, 50a-51a.

REASONS FOR GRANTING THE PETITION

While this Court does not often review decisions from the District of Columbia Court of Appeals, several decisions of this Court make clear that it can and will do so in the exercise of its supervisory authority over that federal court "in exceptional situations where egregious error has been committed." *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (citing *Griffin v. United States*, 336 U.S. 704, 717-718 (1949); *Fisher v. United States*, 328 U.S. 463, 476 (1946)).[6] These cases show that this Court will

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[6] The District of Columbia Court of Appeals is a federal court. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) (creating the court); *see also* 28 U.S.C. § 1257 (including the court in the definition of the "highest court of a State" for purposes of certiorari jurisdiction). In *Pernell*, this Court observed that, because of the *federal* nature of both the court and District of Columbia "local law," this Court has jurisdiction, and therefore discretion, to review decisions from the court interpreting the "local law" of the District. *See* 416 U.S. at 368-369 (contrasting the Court's lack of jurisdiction to review state court decisions interpreting state law). In a recent in-chambers

exercise such jurisdiction even if the only questions involved concern local District of Columbia law — which is *not* the situation here.

This case presents just such an exceptional situation. The decision below contains several egregious errors, one involving constitutional due process concerns. These egregious errors, if uncorrected by this Court, will have significant and far reaching effects on our nation's major law firms. The petition for a writ of certiorari therefore should be granted. Indeed, in light of the obvious, indefensible nature of the Court of Appeals' errors, SNR respectfully submits that summary reversal is appropriate.

The Court of Appeals' first egregious error is its nullification of Delaware law concerning the application of the covenant of good faith and fair dealing in the context of law firm decisions as to the compensation of partners. That this question involves Delaware law does not obviate either the need for or the appropriateness of this Court's review. Even where the *sole* issue presented concerns state law (*not* the circumstance here), this Court has been willing to grant review where the matter is of substantial importance. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996); *Steele v. Gen. Mills, Inc.*, 329 U.S. 433, 438 (1947); *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, 306 U.S. 103, 107 (1939). Indeed, this

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opinion, *Jackson v. District of Columbia*, No. 09A807 (March 2, 2010), Chief Justice Roberts, in denying a stay on a matter of local concern, noted that the parties later may seek Supreme Court review and that the Court's practice of "deferr[ing] to the decisions of the courts of the District of Columbia on matters of exclusively local concern" is "'a matter of judicial policy' -- if not 'judicial power.'" *Id.* at 2 (citing *Whalen v. United States*, 445 U.S. 684, 687 (1980), and *Fisher v. United States*, 328 U.S. 463, 476 (1946)).

Court has said that it "undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law." *Leavitt*, 518 U.S. at 144-45. As demonstrated below, not only is the Court of Appeals' ruling on the covenant manifestly wrong, as the court's *own factual findings show*, it amounts to a "nullification" of Delaware law.

The decision below invites juries to invade the discretionary compensation decisions of law firms operating with non-formulaic compensation systems. Thus, the decision is of enormous importance to many national and regional law firms, as well as other partnerships, other professional associations, and corporations with similar non-discretionary compensation systems. Those concerns are only heightened because Delaware law as to the covenant is much the same as the law of many jurisdictions[7] and because so many large law firms have offices in the District of Columbia and are Delaware entities.[8]

The second egregious error concerns the application of District of Columbia remedies law. The Court of Appeals allowed respondent, far beyond the "benefit of his bargain," to recover (1) for 2006, when the Partnership Agreement in effect when he left the firm required him to retire at the end of 2005,[9] and (2) for periods after he *voluntarily retired*. Yet, both the Partnership Agreement and overwhelming precedent makes clear that an employee who *voluntarily* retires (as the trial court found respondent had done) is not entitled to compensation for periods

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[7] *See* Section I(B) *infra*.

[8] See note 16, *infra*.

[9] In its initial decision, the Court of Appeals expressly found that the Partnership Agreement required respondent to retire at the end of 2005. App., *infra*, 22a n.12.

following retirement.[10] The District's law governing remedies is federal law, and, as the court below conceded, is no different than the remedies law of Delaware and other States. This Court should not countenance such egregious misapplication of federal law.

The third egregious error implicates fundamental due process principles. This Court has been more inclined to review decisions by the District of Columbia Court of Appeals where, as here, constitutional issues are involved. *See Miller v. United States*, 357 U.S. 301, 306 (1958); *Pernell*, 416 U.S. 363 at 369; *Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476. Here, due process does not allow an award of damages where liability is not, and cannot be, fully and validly established. Damages cannot constitutionally be awarded respondent for 2006 (as the Court of Appeals has allowed) when the controlling Partnership Agreement required him to retire at the end of 2005. Moreover, *no trier of fact ever considered whether the Partnership Agreement's retirement-age provision precluded an award of damages for 2006.* Damages also cannot constitutionally be awarded for periods after respondent voluntarily retired when the controlling Partnership Agreement (the "bargain" he reached) clearly provided for compensation only so long as he worked for the firm. By allowing damages for periods where all elements of liability have not been (and could not be) established, the opinion below violates due process and conflicts with recent decisions of this Court holding that punitive damages cannot be awarded for conduct for which liability has not been found.

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[10] *See* Section II(B) *infra*.

I. THE COURT OF APPEALS NULLIFIED DELAWARE LAW GOVERNING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. The Court Of Appeals Disregarded Critical Delaware Law Requirements

As the trial court and the parties agreed, Delaware law regarding the covenant applied in this case. Indeed, the agreed-on jury instruction was based, virtually word-for-word, on the leading Delaware case. *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). The charge said in part:

> Existing contract terms control . . . such that implied good faith cannot be used to circumvent the parties bargain . . . Thus, one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement.[11]

Accordingly, under Delaware law, if SNR's conduct was authorized by the Partnership Agreement, it cannot be the basis of a claim for breach of the implied covenant of good faith and fair dealing.

The Court of Appeals expressly found that the Partnership Agreement covered both compensation decisions and resolution of compensation disputes. App., *infra*, 24a n.14 (stating that "the Agreement [that respondent] executed *governed his compensa-*

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[11] The charge was consistent with previous Delaware opinions. App., *infra*, 92a-93a. *See, e.g., Dave Greytak Enter., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract . . . the implied duty to perform in good faith does not come into play").

tion in its entirety") (emphasis added). The court also said:

> The [firm's Partnership] Agreement vests in the Policy and Planning (P&P) Committee *the authority* to set, and re-adjust every two years, the percentage of net firm income to be earned by each equity partner "in accordance with procedures established from time to time by the P&P Committee. . . .
>
> The Agreement itself listed no criteria by which contract numbers were to be fixed; it left the process for doing so to the P&P Committee. . . .[12]
>
> By signing the Schedule A, [respondent] "re-executed" the Partnership Agreement "as modified" to reflect the "adjustment[] of Schedule A" stating his contract number for the next two years. . . .
>
> *[T]he evident purpose of the Schedule A was to resolve any outstanding compensation disputes rather than to permit later controversy, and possibly lawsuits, challenging the contract numbers.*

Id. at 3a-7a (emphasis added).[13]

Despite these factual findings, the Court of Appeals declined to rule that the covenant was inapposite under Delaware law. Indeed, in its initial deci-

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[12] *See also* App., *infra*, 21a (recognizing "the firm's 'non-formulaic' approach to compensation"). P&P fixed all partners' compensation for the next two year period, even for those, like respondent, who were required to retire during that period. CA App. A-2433, A-2441.

[13] These factual findings were consistent with the record. *See* CA App. A-2446-51.

sion, the Court of Appeals did not even discuss this central, dispositive issue. *See id.* at 52a-84a. SNR noted the inconsistencies between the court's factual findings and its decision on the covenant in its petition for rehearing. Although the court modified a portion of its initial opinion in response to that petition, it once again failed to address the rule that, under Delaware law, the covenant is inapplicable where there is a governing contract. *Id.* at 47a-49a.

The Court of Appeals also disregarded another significant, explicit requirement of Delaware law, namely that the covenant applies only if it is clear from the controlling writing that the parties would have proscribed the conduct at issue had they considered it. *Id.* at 52a-84a. The trial court, quoting the *Dunlap* case, charged the jury as follows: *"Only when it is clear from the writing* that the contracting parties 'would have agreed to pr[o]scribe the act later complained of had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections." App., *infra*, 93a (emphasis added).[14]

In response to SNR's assertion that this portion of the charge was not met, the Court of Appeals, in a footnote, dealt only with SNR's argument that the other partners had ratified the compensation award to respondent.[15] Notably, that footnote does not even

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[14] This principle recently was reaffirmed in *Amirsaleh v. Bd. of Trade*, No. 2822-CC, 2009 Del. Ch. LEXIS 192, at *13-*14 (Del. Ch. 2009) (the covenant applies when "the parties would have bargained for a contractual term proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose").

[15] *See* App., *infra*, 11a n.6 (rejecting as "fanciful" SNR's argument that "that by signing their own Schedule A's (and 're-executing' thereby the Partnership Agreement) for 2005-2006

attempt to demonstrate that "it is clear from the writing [Partnership Agreement] that the contracting parties [partners] would have agreed to proscribe the act later complained of [the compensation decision concerning respondent] had they thought to negotiate with respect to that matter." Indeed, demonstrating that would have been impossible because nothing in the Partnership Agreement makes that "clear." Certainly, respondent, although repeatedly invited to do so, has pointed to no provision in the Partnership Agreement that provided the requisite clarity.

In its initial rehearing petition, SNR observed, unavailingly, that the Court of Appeals also had ignored this specific, controlling element of Delaware law. While the court modified its opinion somewhat, this portion of the opinion was untouched. The Court of Appeals' continued avoidance of a crucial requirement of Delaware law — an avoidance that effectively results in its nullification — is the type of unacceptable judicial conduct that calls for this Court's review and summary reversal.

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after Rosenthal had left the firm, the other equity partners of SNR all implicitly approved his contract number for that period"). However, the testimony of plaintiff's witness Michael Schlanger, a former SNR partner who never had served on the firm's Policy and Planning Committee, showed that Mr. Schlanger was fully familiar with information relating to respondent's compensation and that of other SNR partners. (CA App. A-2234-39, A-2253, A-2258-59). Mr. Schlanger signed Schedule A and thus "re-executed" the Partnership Agreement as modified by all the Schedule As. CA App. A-2446-51.

B. The Egregious Errors Regarding The Covenant Are Important And Warrant This Court's Review

The Court of Appeals' decision is important. Many large firms, like SNR, have offices in the District of Columbia and are Delaware P.C.s or L.L.P.s.[16] Furthermore, the decision has enhanced significance because: (1) many major law firms, like SNR, have *discretionary*, non-formulaic compensation systems,[17] and (2) Delaware law regarding the covenant is similar to that of many other jurisdictions, thus giving the Court of Appeals' ruling broad precedential implications.

Williston on Contracts, § 63:22, sums up the general law, stating in part:

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[16] Ninety-six of the 2010 AmLaw 100 firms have offices in the District of Columbia. *See* ALM MEDIA PROPS. LLC, 2010 AMLAW 200 (2010). Thirty-one of the 2010 AmLaw 100 firms are Delaware P.C.s or L.L.P.s. *See* Div. of Corps., Dept. of State, *Gen. Info. Name Search*, *available at* https://delecorp.delaware.gov/tin/GINameSearch.jsp. In addition, "[m]ore than 850,000 business entities," including "[m]ore than 50% of all publicly-traded companies in the United States [and] 63% of the Fortune 500 have chosen Delaware as their legal home." Div. of Corps., Dept. of State, State of Del., *About Agency* (May 27, 2010), *available at* http://corp.delaware.gov/aboutagency.shtml. Notably, the U.S. subsidiaries of PricewaterhouseCoopers LLC, Deloitte & Touche LLP, Ernst & Young US LLP, and KPMG LLP all are Delaware entities.

[17] *See, e.g.*, Joel A. Rose, *Partner Compensation and Performance Standards*, COMP. & BENEFITS FOR L. OFFICES (Inst. of Mgmt. & Admin. June 2010) (stating that in the "overwhelming majority" of "the more financially and professionally successful law firms . . . formal weighting is not applied to . . . compensation standards, nor is an arithmetical or formula-driven approach to analyzing these standards applied").

> As a general principle, there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract. ... *This is so even where the contractual provision at issue is one that purports to grant to the defendant absolute discretion* to take certain actions or engage in certain conduct under the contract; such a provision, stated simply, permits the defendant substantial latitude, and as long as the discretion is exercised as permitted under the contract, and *without evident bad faith motive or malice*, its exercise cannot be a breach of the more general implied promise of good faith and fair dealing.

23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2000) (emphasis added). This is fully in line with settled Delaware law, which contrary to the Court of Appeals' characterization, App., *infra*, 8a-11a, 20a-21a, requires a showing of bad faith or malice before the covenant can be applied. *See Amirsaleh*, 2009 Del. Ch. LEXIS 192, at *17-*18 (holding that "to prove a breach of the implied covenant plaintiff must demonstrate that defendants acted in 'bad faith'").[18]

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[18] It is established that SNR was not acting with "bad faith motive or malice." The Court of Appeals, observing that, to show a breach of the implied covenant, Delaware law requires "proof of arbitrary or unreasonable conduct, not more," held in denying punitive damages that the record was "far from evincing evil motive, actual malice, or willful disregard of [respondent's] rights." App., *infra*, 20a-21a.

In *Roan v. Keck, Mahin & Cate*, 962 F.2d 10 (table), 1992 WL 104789, at *6 (7th Cir. May 19, 1992), the Seventh Circuit declined to apply the covenant under closely analogous circumstances. It affirmed the district court's holding that "determinations made in accordance with the law firm [partnership] agreement would not be subject to legal challenge under some unspecified standard of fairness." *See also La Quinta Corp. v. Heartland Props. LLC*, 603 F.3d 327, 338 (6th Cir. 2010) ("[W]here the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing") (quoting *M&I Marshall & Ilsley Bank v. Schlueter*, 655 N.W.2d 521, 525 (Wis. App. 2002)); *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010) ("The implied duty of good faith and fair dealing cannot . . . create duties inconsistent with the contract's provisions."); *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1261 (10th Cir. 2005) ("courts are not at liberty to impose obligations under the guise of the implied covenant which are inconsistent with the terms of the contract") (citation omitted); *Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728, 733 (8th Cir. 2003) (no implied good faith obligation "where the parties have unmistakably expressed their respective rights"); *Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 294 F.3d 383, 395 (2d Cir. 2002) (parties "cannot avoid the express terms of the contract by relying on the implied covenant of good faith and fair dealing"); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1318 (11th Cir. 1999) ("a cause of action for breach of the implied covenant cannot be maintained ... in derogation of the express terms of the underlying contract"); *Clark v. America's Favorite Chicken Co.*, 110

F.3d 295, 297 (5th Cir. 1997) (holding that "the implied obligation to execute a contract in good faith usually modifies the express terms of the contract and should not be used to override or contradict them") (citation omitted).[19]

The Court of Appeals' decision conflicts with these decisions and essentially stands alone in its misapplication of the covenant. But its decision, which was well-publicized in legal circles,[20] is likely to lead to both litigation and confusion in future disputes concerning law firm compensation. Review by this Court is therefore warranted.

II. THE COURT OF APPEALS HAS EGREGIOUSLY MISAPPLIED DISTRICT OF COLUMBIA REMEDIES LAW

The trial court determined that respondent voluntarily retired from SNR on July 31, 2005. App., *infra*, 92a. It also held that respondent could not recover damages for periods after his voluntary retirement. *Id.* at 39a-40a. The Court of Appeals did not disturb the finding that respondent voluntarily retired. *Id.* at 12a. Rather, it ruled as a matter of

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[19] *See also, e.g., Clalit Health Servs. v. Israel Humanitarian Found.*, 395 F. Supp. 2d 21, 23 (S.D.N.Y. 2005); *Farris v. Hutchinson*, 838 P.2d 374, 376-77 (Mont. 1992); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal.*, 826 P.2d 710, 728 (Cal. 1992); *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944, 947 (Tex. 1984); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 786 (Conn. 1984).

[20] *See, e.g.*, Ross Todd, *Former Sonnenschein Partner Gets Second Shot at Fee Dispute*, THE AMLAW DAILY (Jan. 5, 2010), *available at* http://amlawdaily.typepad.com/amlawdaily/2010/01/ex-sonnenschein-partner.html; Leigh Jones, *Former Partner Gets a Second Shot at Sonnenschein in Fees Dispute*, THE NAT'L L.J. (Jan. 6, 2010), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437415539.

law that respondent could seek damages for periods *after* he voluntarily retired. The court said he was entitled to cease performing under the contract (Partnership Agreement) and to receive the "benefit of the bargain" into which he entered, concluding that "the voluntariness or not of his departure is something we need not decide." *Id.*

The Court of Appeals seriously misapplied District of Columbia remedies law in not perceiving that respondent's "bargain" was that he would be compensated only while he worked for SNR. Upon a breach of the covenant, he was entitled to stop work and to sue for damages for the time he worked at the firm after the breach. But respondent was not entitled voluntarily to stop work and sue for subsequent periods because the Partnership Agreement (his bargain) undisputedly established that he was entitled to compensation only while he worked and that, after he ceased work, he was entitled only to certain limited retirement benefits. *Id.* at 88a-89a at ¶ 6.1 ("In the event of the . . . retirement . . . of an Equity Partner . . . there shall be paid to the person or persons designated in the latest writing delivered to the partnership" the following outlined benefits.).

The conclusion that respondent is not entitled to compensation for periods after voluntary retirement is consistent with the familiar principle that, notwithstanding a material breach, an injured party remains bound by a contract, if the injured party continues to perform in accordance with that contract after the breach. *See* 14 WILLISTON ON CONTRACTS § 43:15 ("conduct [after breach] indicating an intention to continue the contract in effect constitutes a conclusive election, in effect waiving the right to assert that the breach discharged any obligation

to perform").[21] Respondent remained at the firm (and collected compensation) for seven months after SNR's purported breach, CA App. A-6355-56, and thus remained bound by the Partnership Agreement. Under that Agreement, he forfeited any right to compensation after July 31, 2005, when he voluntarily retired from the firm.

The Court of Appeals' decision also conflicts with overwhelming precedent — whether based on breach of contract, constitutional violation or discrimination — holding that a wronged plaintiff is *not* entitled to compensation after voluntary retirement. *See Adler v. John Carroll Univ.*, 549 F. Supp. 652, 656 (N.D. Ohio 1982) (Title VII and breach of contract); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 113, 120 (1st Cir. 1977) (violation of constitutional rights); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (holding that an employee who "leaves his or her employment as a result of . . . discrimination must show either an actual or constructive discharge in order to receive" back pay);[22] *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1237 (10th Cir. 2000) (stating that an employee must have been constructively discharged to be entitled to a back pay award); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155 (3rd Cir. 1999) ("Title VII allows back pay awards when an employee does not leave her employment voluntarily."); *Jurgens v. EEOC*, 903 F.2d 386, 389

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[21] *See, e.g., Accusoft Corp. v. Palo*, 237 F.3d 31, 55-56 (1st Cir. 2001) (injured party, whose "conduct indicate[s] a willingness to continue to honor a contract," is bound by the contract); *Apex Pool Equip. Corp. v. Lee*, 419 F.2d 556, 562 (2d Cir. 1969) ("If the injured party chooses to go on," he "continu[es] the contract.").

[22] There was no constructive discharge in the present case, but rather voluntary retirement. App., *infra*, 92a.

(5th Cir. 1990) ("[I]t is well settled in this circuit that, in order for an employee to recover back pay for lost wages beyond the date of his retirement or resignation, the evidence must establish that the employer constructively discharged the employee."); *Major v. Rosenberg*, 877 F.2d 694, 695 (8th Cir. 1989) (holding that, when an employee resigns, he is "entitled to awards of back pay . . . only if" he was "constructively discharged"); *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 256 (6th Cir. 1986) ("If there was no actionable constructive discharge, Gomez cannot recover for those losses directly attributable to his voluntary decision to retire"); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 168 (2d Cir. 1998) ("the backpay period ends prior to judgment if the plaintiff has theretofore retired"); *Clark v. Marsh*, 665 F.2d 1168, 1172 (D.C. Cir. 1981) (Title VII plaintiff entitled to damages "for the period subsequent to her retirement" *only if* the court determined that the plaintiff had been constructively discharged); *Wis. Ave. Nursing Home v. D.C. Comm'n on Human Rights*, 527 A.2d 282, 292 (D.C. 1987) (stating, *inter alia* that "a voluntary termination of employment represents a choice to incur a loss of earnings").[23]

The Massachusetts and New Jersey cases cited by the court to support its position did *not* involve voluntary retirements, but rather *constructive or actual discharges. See Kass v. Brown Boveri Corp.*, 488 A.2d 242, 245 (N.J. Super. Ct. App. Div. 1985) (employer's "attempt to reclassify plaintiff to a lesser job

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[23] The Court of Appeals distinguished the *Wisconsin Avenue Nursing Home* case as concerning "employment discrimination, not a breach of contract," without explaining why that distinction has any relevance in determining the measure of damages. App., *infra*, 13a-14a.

status constructively discharged him in violation of his employment contract"); *Ward v. Am. Mut. Liab. Ins. Co.*, 443 N.E.2d 1342, 1344 (Mass. App. Ct. 1983) (case involved "defendant's wrongful discharges of the plaintiffs").[24]

The Court of Appeals' ruling in this regard, coupled with its misapplication of Delaware law discussed above, may work to the great disadvantage of the nation's law firms. Read together they mean that a partner — disgruntled with his compensation where the partnership agreement establishes a non-formulaic, discretionary compensation system — can quit the firm, sue for breach of the covenant claiming unfairness, and seek compensation for future periods, even if the partnership agreement provides that he will not be compensated if not working for the firm. That is distinctly not the law in other jurisdictions. It should not be the law in the District of Columbia.

Moreover, by allowing respondent to seek 2006 compensation, the Court of Appeals gave him *more* than his bargain. As discussed in detail in Section III, and as that court initially found, the Partnership

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[24] The Court found it "hard to imagine that the firm would have allowed [respondent] to remain a partner once he sued it." App., *infra*, 13a. However, for wronged plaintiffs to remain employed while they sue is not unique. *See, e.g., EEOC v. Kelley Drye & Warren, LLP*, No. 1:10-cv-00655-LTS-MHD (S.D.N.Y. filed Jan. 28, 2010) (EEOC suing on behalf of partner still with firm); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1134 (9th Cir. 1986) ("An employee, faced with an obstacle in the logical progression and development of a career should not quit at the first sign of institutional discrimination. Restricting back pay awards encourages the employee to work with supervisors within the existing job setting and employment relationship in an effort to overcome resistance within that workplace and to eradicate the discrimination.").

Agreement in effect when respondent left SNR required him to retire at the end of 2005. To allow him damages for 2006, a year for which he had no right to compensation, was yet another egregious misapplication of District of Columbia remedy law.

This Court periodically has affirmed its "judicial power" to review decisions of the District of Columbia Court of Appeals concerning local law matters "in exceptional situations where egregious error has been committed." *Pernell*, 416 U.S. 363 at 369. *See also Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476. The Court is particularly prone to do so where (as here) the decision has ramifications "not confined to the Potomac's shores, but reaching far beyond." *Gen. Motors Corp. v. Dist. of Columbia*, 380 U.S. 553, 556 (1965). This judicial power, we respectfully submit, would be well used to review (and summarily reverse) the aberrant decision here that blatantly ignores both the underlying facts and overwhelming precedent.

III. THE COURT OF APPEALS' DECISION VIOLATES FUNDAMENTAL DUE PROCESS PRINCIPLES

In addition to grossly misapplying District of Columbia remedies law, the Court of Appeals' allowance of 2006 damages violates fundamental due process principles. That court expressly left open the factual question (after initially resolving it conclusively in SNR's favor) of whether respondent was required to retire at the end of 2005 under the Partnership Agreement, which at the time mandated retirement at age 65. As explained below, that question was never resolved by the trial court or submitted to the jury; nor has any trier of fact determined whether the retirement age provision precluded an award of 2006 damages, when respondent had no

right to employment or compensation. Thus, critical issues going to SNR's liability for 2006 have not been resolved — and, indeed, could not be resolved in respondent's favor. Due process is also violated by allowing damages for any period after respondent's voluntary retirement (July 31, 2005) beyond which, under the Partnership Agreement, he had no right to compensation.

This Court's cases make clear that due process requires that all elements of a liability claim be proven before damages can attach. The Court of Appeals' disregard of this bedrock principle is untenable and requires this Court's review and summary reversal.

A. Due Process Precludes The Imposition Of Damages Without A Finding Of Liability

Precedent from this Court and others establish that all elements of an underlying claim of liability must be proven before damages are awarded. *See Farrar v. Hobby*, 506 U.S. 103, 120 (1992) ("*Every* nominal damage award has as its basis a finding of liability.") (citation omitted); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) (holding that "liability is a *sine qua non* of a damage award"); *Gibson v. Am. Cyanamid Co.*, No. 07-C-864, 2010 U.S. Dist. LEXIS 59378, at *58 (E.D. Wis. June 15, 2010) (holding that "it violates due process when there is no nexus or provable connection between a damages award and the harmful conduct of the defendant").

Recently, this Court twice has held that due process precludes the imposition of punitive damages for acts for which liability has not been found. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In *State Farm*, this Court held: "Due

process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. The defendant must be found liable for an actual claim; otherwise, a damages award is "an irrational and arbitrary deprivation of the property of the defendant." *Id.* at 429.

In *Philip Morris*, this Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . ., *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." 549 U.S. at 353. Imposing damages for acts for which the defendant had not been found liable "would amount to a taking of 'property' from the defendant without due process." *Id.* at 349.

State Farm and *Philip Morris* thus establish that it violates due process to impose punitive damages for acts for which liability has not been established. So also does due process preclude the imposition of a compensatory damages award unsupported by a finding of liability.

Other cases show that due process does not allow the government or a court to deprive a person of property without a prior proper judicial determination based on sufficient evidence that such deprivation is justified. *United States v. $8,850,* 461 U.S. 555, 562 n.12 (1983) (stating that "[t]he general rule, of course, is that absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified") (citing *Boddie v. Conn.*, 401 U.S. 371, 378-379 (1971)). *See also Fuentes v. Shevin,* 407 U.S. 67, 96 (1972) (prejudgment replevin provisions held unconstitutional be-

cause they permitted "deprivation of property without due process of law"); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) ("[D]ue process is afforded only by the kinds of 'notice' and 'hearing' . . . [that establish] the underlying claim . . . *before* . . . depriv[ation] of . . . property") (emphasis in original).

B. The Court Of Appeals Imposed Damages Although Critical Elements Of The Underlying Liability Claim Were Unresolved

The Court of Appeals, in its *amended* opinion, expressly left open the question of whether the Partnership Agreement's mandatory retirement age requried respondent to retire at the end of 2005. In its *first* opinion, it found that the record established that the retirement age was 65 and that respondent, who turned 65 in February 2005, CA App. A-1462-63, was required by the Partnership Agreement to retire at the end of 2005. App., *infra* 22a n.12. The court said:

> [T]he record ... supports summary judgment to SNR on this issue because it demonstrates, and Rosenthal does not dispute, that in 1999 the equity partners voted, by the required three-fourths margin under the Agreement, to change the retirement age to 65. Rosenthal almost certainly knew of that change because in late 2004, when he was purportedly told he would have to retire by the end of 2005, he did not question the decision but instead asked for a one-year extension of the date. And no evidence was proffered that the partners had rescinded the change of age by the time Rosenthal left the firm. . . .

App., *infra*, 74a-75a. These conclusions were fully supported by the record. CA App. A-6371-72.

Because respondent had to retire at the end of 2005, he had, under the then-existing Partnership Agreement, the right to receive compensation only until then — and not in 2006. Nonetheless, as explained above, the Court of Appeals also allowed respondent damages for 2006, purportedly to give him the "benefit of [his] bargain." App., *infra*, 12a.

In its first petition for rehearing, SNR contended that the Court of Appeals' initial decision was internally inconsistent, and that, as the Partnership Agreement shows and that court expressly found, respondent had "bargained" for compensation only through the end of 2005. Apparently recognizing that its opinion was inconsistent, the Court of Appeals reversed course. Its March 18 Order withdrew the above-quoted passage and substituted a footnote that reads:

> Our original opinion in this case concluded that summary judgment was also proper on the claimed breach of the retirement clause because undisputed evidence showed that, under a 1999 amendment of the Partnership Agreement, Rosenthal was obligated to retire at age 65. On further reflection in light of SNR's petition for rehearing and the opposition thereto, we now conclude that the evidence is not one-sided on whether Rosenthal, had he not become SNR's adversary by suing it, would have had to retire at age 65 or, instead, could have remained with the firm under a then-pending revision of the Agreement eliminating the mandatory retirement age. But that issue is a moot one because, as stated

> in the text, Rosenthal furnished the trial court with no yardstick by which his damages for the alleged breach of the retirement clause could reasonably be calculated, and on that ground alone summary judgment was correctly entered against him on the claim.[25]

App., *infra*, 48a-49a (emphasis added).

This language, and the withdrawal of the passage in its initial opinion, expressly leave open the critical issue of whether respondent, at the time of the breach and when he left SNR, was subject to mandatory retirement at the end of 2005. Nonetheless, the Court of Appeals still ruled that respondent is entitled to seek damages for 2006. *Id.* at 30a-31a. Its withdrawal of its fully-supported finding of mandatory retirement at age 65, evidently because that finding did not comport with its damage finding, is the type of egregious decision-making that brings disrespect to the rule of law and that this Court, under its precedents, should review.

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[25] In arguing to the trial court (successfully) that respondent voluntarily retired, SNR noted that he was told that the Partnership Agreement might be amended to remove the retirement age, and if that occurred, he would not be required to retire at the end of 2005. *But he voluntarily retired anyway in July 2005.* App., *infra*, 92a. That the Partnership Agreement later was so amended does not change the basic, critical fact — which the Court of Appeals recognized in its initial opinion — that, when respondent "left the firm," he had the right under the Partnership Agreement to work only to the end of 2005. *Id.* at 22a n.12. He cannot now take advantage of an amendment that occurred *after he left the firm* to contend he could have worked in 2006. Whatever rights he had under the Partnership Agreement (his "bargain") were those provided by its terms when he departed SNR.

C. Critical Elements of Respondent's Liability Claim Were Not Resolved At Trial

No trier of fact has resolved the question whether the Partnership Agreement required respondent to retire at the end of 2005 and thus precluded damages for 2006. The trial judge did not resolve this critical question. Rather, after he ruled that respondent voluntarily retired in July 2005, he repeatedly and expressly concluded that the retirement age was "irrelevant" to all other issues in the case, *including damages*. For example, when respondent's counsel inquired whether the trial court had determined whether the Partnership Agreement had been validly amended to force retirement at age 65, rather than 70, the court stated:

> In my view the motion for summary judgment doesn't hinge on whether or not [the Partnership Agreement] was [amended] or not . . . Clearly there was a dispute as to whether or not it was amended and accepted . . . In essence, my finding on this issue that he resigned . . . has absolutely nothing to do with the amendment, because I find that . . . *it is irrelevant in terms of the legal responsibility that SNR owed to Mr. Rosenthal.*

CA App. A-760 (emphasis added).

On several other occasions, the trial judge ruled that the retirement age was "irrelevant" and "not in the case." For example, he stated that the issue "of having to retire because of age is out of the case. I have ruled that that's not in the case." *Id.* at A-2564-65. Similarly, when the jury sent him a note during deliberations asking to be "directed to an admitted document that . . . changes the retirement age to 65," *id.* at A-3575, the trial judge again ex-

pressed his view to the parties that "[w]hether the retirement age is 65 or 70 is *irrelevant* to the decision they have to make." *Id.* at A-3576 (emphasis added).[26]

Thereafter, respondent's counsel suggested to the trial judge that the jury "could be focusing on the issue of damages" and that the jury "could be considering [when] Mr. Rosenthal's damages should [be] cut off" and whether he could receive damages "for a period after he was 65 because he would have had to retire then anyway." *Id.* at A-3585. The trial judge rejected that concept "because I have already instructed them [that] they are supposed to consider the contract years . . . 2005-2006 without regard to age." *Id.* He specifically refused to give an additional instruction regarding the relationship of the retirement age and damages, stating: "Well, I will simply not do that because the question has nothing to do with damages whatsoever." *Id.* at A-3585.

Eventually, the trial court advised the jury that the court could not direct it to any document or evidence. It also advised the jury that the court had ruled that respondent voluntarily retired from the firm on July 31, 2005, and that the jury could not make any determination that contradicts this finding. CA App. A-3588.

Because the trial judge deemed the matter "irrelevant" and "not an issue in this case," he declined to decide and the jury was not allowed to consider whether the Partnership Agreement's retirement provision would have required respondent to retire

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[26] SNR's counsel noted to the trial court that "there were documents that might have answered that question that were not admitted because the Court ruled that this issue was not an issue." CA App. A-3578.

at the end of 2005 or whether it precluded damages for 2006.

D. The Due Process Violations Warrant This Court's Review

As this discussion demonstrates, the Court of Appeals has allowed respondent to seek damages for 2006 where (1) no trier of fact considered whether the Partnership Agreement in effect when he left the firm precluded him from compensation for 2006, and (2) the evidence plainly shows that it did. As this Court's cases demonstrate, to award damages for a year for which liability has not been, and could not be, validly established is egregious error not consistent with due process or the most basic precepts of the rule of law.

Similarly, as also demonstrated, the Partnership Agreement established conclusively that respondent was not entitled to compensation after he voluntarily retired. Because liability for the post-retirement period cannot be established, due process also disallows damages for that period.

Even without these due process violations, there are ample reasons to review and summarily reverse the manifestly misguided ruling of the District of Columbia Court of Appeals. That these troubling due process issues exist gives this Court yet more grounds to exercise its judicial power to do so. *Pernell*, 416 U.S. 363 at 369; *Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted and the challenged rulings of the District of Columbia Court of Appeals summarily reversed.

Respectfully submitted,

JAMES HAMILTON
Counsel of Record
DAVID B. SALMONS
DAVID I. ACKERMAN
RAECHEL K. ANGLIN
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6026
james.hamilton@bingham.com

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